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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1187

FRANK A. EYMAN, WARDEN, ARIZONA STATE PRISON,

Petitioner,

-vs-

JOSEPH ALVIN SCHANTZ,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, FRANK A. EYMAN, Warden, Arizona State Prison, hereby petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit, holding that the post-indictment questioning of JOSEPH ALVIN SCHANTZ by a State psychiatrist on the county attorney's instruction, without notice to and in absence of counsel, violated his right to the assistance of counsel at all critical stages of the criminal proceedings against him.

OPINIONS BELOW

No written opinion was rendered by the Honorable William P. Copple, District Judge, United States District

Court for the District of Arizona. The opinion of the Ninth Circuit Court of Appeals is unreported and is therefore attached hereto as Appendix "A".

JURISDICTION

The Order of which the State of Arizona seeks review was made in Cause No. 22,764 on October 31, 1969. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U.S.C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

The precise question is whether the court erred when it concluded that potential substantial prejudice inhered in Schantz' post-indictment pretrial confrontation with the State's psychiatrist, in violation of his rights under the Fifth Amendment to

the Constitution of the United States, and whether Schantz was denied his right to counsel under the Sixth Amendment to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V

Amendment VI

STATEMENT OF THE CASE

Shortly after midnight on March 24, 1962, Schantz was observed by several neighbors in the act of stabbing his wife repeatedly with a butcher knife and beating her about the head and body with a cast iron skillet. The neighbors had been awakened by the deceased's screams.

Schantz pleaded not guilty to a charge of murder and subsequently, pursuant to Rule 192, Rules of Criminal Procedure,

17 A.R.S., served notice of his intention to show that he was insane or mentally defective at the time of the offense.

At the trial, Doctor Maier Tuchler, a psychiatrist, was called by Schantz and he testified that he had examined Schantz and had determined that Schantz did not know the nature and significance of his acts and did not know right from wrong. He further testified that Schantz had total amnesia for the events related to the homicide and that his efforts to bring back Schantz' memory were unsuccessful.

Prior to the trial, the State had made a motion requesting the court to allow two State appointed psychiatrists to examine Schantz. On the day set for the hearing of the motion, the county attorney with-

drew it, apparently recognizing that in Arizona there was (and is) no authority for obligating a criminal defendant to be examined by State appointed psychiatrists. (See, Steward v. Superior Court of Maricopa County, 94 Ariz. 279, 383 P. 2d 191). On that same day, however, Dr. Paul Bindelglas, a psychiatrist, was sent to Schantz' home by the county attorney, without notice to Schantz or his counsel. Thereafter, Dr. Bindelglas was called to rebut the testimony previously offered by Dr. Tuchler. The testimony of Dr. Bindelglas, in essence, was that he presented himself at Schantz' home, identified himself as a psychiatrist appointed by the State, asked him to submit to a psychiatric examination and was refused by

Schantz.

Counsel for Schantz objected at the trial to the testimony of Dr. Bindelglas.

After the Arizona Supreme Court affirmed on appeal Schantz' conviction, he brought a habeas corpus proceeding in the United States District Court in Phoenix, Arizona, alleging inter alia that in allowing Dr. Bindelglas' testimony over the objections of his attorneys, he was deprived of his right against self-incrimination and his right to assistance of counsel under the United States Fifth, Sixth and Fourteenth Amendments. Judge William P. Copple agreed and issued his opinion and order. Notice of appeal was given. The Ninth Circuit Court of Appeals

rendered its decision on October 31, 1969, affirming the District Court.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The opinion of the judges of the Ninth Circuit Court of Appeals flies in the face of opinions expressed in other United State Circuit Courts of Appeals.

In People v. Wax, 75 Ill.App. 2d 163, 220 N.E.2d 600, a case similar on its facts to the case at bar, this Court denied certiorari, 387 U.S. 930, 87 S.Ct. 2051, 18 L.Ed.2d 991.

The Seventh Circuit Court of Appeals, in Wax v. Pate, 409 F.2d 498, at page 499 said:

> We agree with the view expressed in the District Judge's carefully

> reasoned opinion that a psychiatric examination requested by the prosecution and conducted by a physician designated by the prosecution who may testify at the trial on the issue of insanity does not constitute a "critical" stage of the proceedings constitutionally requiring notice and presence of counsel, such as was involved in the line-up in United States v. Wade, 1966, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149, or the arraignment in Hamilton v. Alabama, 1961, 368 U.S. 52, 55, 82 S.Ct. 157, 7 L.Ed.2d 114.

The opinion of the Ninth Circuit cites as authority for its holding, United States v. Wade, 386 U.S. 218 (1967), also cited in Wax v. Pate, supra. See also, United States v. Albright, 388 F.2d 719 (4th Cir. 1968), and the cases cited therein; and Ramer v. United States, 411 F.2d 30 (9th Cir. 1969).

It is important that this Court

resolve the conflict expressed by the Ninth Circuit Court of Appeals.

CONCLUSION

It is respectfully submitted that this Court should grant certiorari, and the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

GARY K. NELSON
The Attorney General of
the State of Arizona

CARL WAAG
Assistant Attorney General

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH ALVIN SCHANTZ, *Petitioner-Appellee,* vs. FRANK A. EYMAN, Warden, Arizona State Prison, *Respondent-Appellant.*	No. 22,764

[October 31, 1969]

Appeal from the United States District Court
for the District of Arizona

Before: *MADDEN, Judge of the United States Court of Claims, and MERRILL and BROWNING, Circuit Judges

BROWNING, Circuit Judge:

Respondent appeals from an order of the district court in a habeas corpus proceeding which set aside petitioner's conviction of murder in the Superior Court of Maricopa County, Arizona, and ordered petitioner's release from custody unless the State afforded petitioner a new trial within ninety days. We affirm.

Respondent did not deny petitioner's factual allegations, and the district court, without objection, accepted them as true. The facts, thus established except as noted, are as follows.

Petitioner was charged with the murder of his wife. He pleaded not guilty, and served written notice of his intention to rely upon the defense of insanity as required by Arizona law. Ariz. R. Crim. P. 192A (1956).

The county attorney asked petitioner's counsel to submit petitioner to a psychiatric examination by the State. Petitioner's

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*Honorable J. Warren Madden, Judge of the United States Court of Claims, sitting by designation.

counsel refused.[1] The county attorney then filed a motion asking the Superior Court to require petitioner to submit to such an examination. He withdrew the motion on the day set for hearing.[2] On that same day he sent Dr. Paul Bindelglas, a psychiatrist, to call upon petitioner at his home, without giving prior notice of Dr. Bindelglas' visit or its purpose either to petitioner or his counsel. Dr. Bindelglas was a stranger to petitioner. He introduced himself, explained that he was from the county attorney's office, and requested petitioner to submit to a psychiatric examination. Petitioner refused to submit.

At trial, petitioner called a qualified psychiatrist who testified that at the time of the offense petitioner did not know the nature and significance of his acts and did not know right from wrong. The county attorney offered no expert evidence in rebuttal. Instead, he called Dr. Bindelglas to the stand and, over the objection of petitioner's counsel, elicited an account of Dr. Bindelglas' confrontation with petitioner. In summation to the jury, he argued that these facts established that petitioner's defense of insanity was made in bad faith.[3]

---

[1]This fact was not before the district court; it appears in a partial transcript of the State criminal trial appended to the respondent's brief in this court. It would therefore be improper to permit its use to undermine the district court's order. However, since it is submitted by respondent, and not contested by petitioner, we see no impropriety in using it to support the district court's judgment.

[2]About seven months later, the Supreme Court of Arizona held that the courts of that state lacked statutory or inherent power to compel a defendant to submit to a pretrial mental examination. Steward v. Superior Court, 94 Ariz. 279, 383 P.2d 191 (1963).

[3]In summation, the county attorney argued:

> "Now, ladies and gentlemen, there is a saying that a person who seeks justice in a court of law, should come in with clean hands, and I submit to you, ladies and gentlemen, that if this was a bona fide, good faith defense of insanity, why didn't he permit our psychiatrists to examine him? He said he was from the County Attorney's office. He said he was a psychiatrist. He asked to examine him.
>
> If this is a good faith defense, and this man has nothing to hide, why didn't he let our psychiatrist examine him?
>
> His refusal to let our man examine him shows bad faith. We would have liked to have had him examined. . . .
>
> . . . . .
>
> Ladies and gentlemen, I submit to you that this is not a good faith defense of insanity."

The district court set aside petitioner's conviction on two grounds: (1) that the admission of Dr. Bindelglas' testimony and the subsequent comments on it by the county attorney violated petitioner's privilege against self-incrimination; and (2) that the post-indictment questioning of petitioner by a State psychiatrist on the county attorney's instructions, without notice to and in the absence of counsel, violated petitioner's right to the assistance of counsel at all critical stages of the criminal proceedings against him.

We affirm on the second ground.

Reasoning from the language of the Sixth Amendment[1] and principles established by *Powell v. Alabama*, 287 U.S. 45 (1932) and succeeding cases, the Supreme Court held in *United States v. Wade*, 386 U.S. 218 (1967), that "the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial" *Id.* at 226. The defendant's right to counsel at a given stage in a criminal prosecution is not linked "only to protection of Fifth Amendment rights." *Id.* Rather, the essential determinant is "whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." *Id.* at 227.

The precise question, therefore, is whether potential substantial prejudice inhered in petitioner's post-indictment pretrial confrontation with the State's psychiatrist, and whether counsel's presence would have helped avoid that prejudice.

Dr. Bindelglas' testimony resulting from the confrontation substantially prejudiced petitioner at trial. It was the sole evidence offered by the State to rebut the insanity defense. The testimony of the defense psychiatrist regarding petitioner's mental condition was not unimpressive; the trial court, apparently on the basis of that testimony, directed an acquittal of first-degree murder. *State v. Schantz*, 98 Ariz. 200, 205, 403 P.2d 521, 527 (1965). It is at least possible, if not probable, that the jury rejected petitioner's insanity defense because it

[1]The Sixth Amendment right to counsel is, of course, fully applicable to the states through the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335 (1963).

accepted the county attorney's argument that the petitioner's refusal to accede to Dr. Bindelglas' request established that his insanity defense was not submitted in good faith.

Respondent argues that the presence of counsel could not have avoided the prejudice because he could have done no more than advise petitioner to refuse to submit to the examination, the same course of action chosen in the absence of counsel.[5]

Counsel could have done much more.

It seems obvious that the confrontation was a deliberate stratagem by the county attorney to circumvent petitioner's counsel, and obtain either an uncontrolled and unsupervised examination of petitioner, or a refusal which could be used, as it was, with equal effect. Had counsel been present he could have negated this strategy by immediately informing Dr. Bindelglas that the county attorney's attempt, through the agency of Dr. Bindelglas, to communicate directly with petitioner rather than with petitioner's counsel was a gross violation of professional ethics.[6] It is doubtful that the county attorney would have asked Dr. Bindelglas to testify to that conversation assuming its admissibility.

Moreover, counsel could have told petitioner that his refusal might be admitted in evidence against him, and could have advised him whether, in light of this fact, it would have been better to agree to an examination. If this course had been adopted, counsel might have afforded petitioner further protection by insisting that the examination be conducted under appropriate safeguards, such as the use of neutral experts, the presence of a defense representative, and the preparation of a taped or stenographic record of the examination.[7]

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[5]Petitioner's right under Arizona law to refuse the request is conceded. See note 2.

[6]The authorities are fully presented in Judge Hamley's dissenting opinion in Coughlan v. United States, 391 F.2d 371, 376-77 (9th Cir. 1968), noted in 20 Hastings L.J. 958 (1969).

[7]*See* United States v. Driscoll, 399 F.2d 135, 138 (2d Cir. 1968), and cases there cited.

It is no answer to say that these same steps might have been taken by petitioner's counsel after the confrontation, and the prejudice thus avoided. There is nothing in the record to indicate that petitioner's counsel was aware of the confrontation prior to trial. Even if he were, the county

We therefore conclude that under the principles spelled out in *Wade*, petitioner was entitled to and was denied the assistance of counsel at his post-indictment pretrial confrontation with Dr. Bindelglas, and his conviction cannot stand.[8]

The district court's order is also supported by the Supreme Court's decision in *Massiah v. United States*, 377 U.S. 201 (1964). *Massiah* held "that the petitioner was denied the basic protection of [the Sixth Amendment] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel."[9] *Id.* at 206. This is just such a case.

Affirmed.

MERRILL, Circuit Judge, Concurring:

I concur.

I do not, however, feel that we need speculate on what an attorney's presence at the critical moment might have accomplished. Such an inquiry may be pertinent in cases where it is not otherwise readily apparent that the accused at the time was in need of legal advice as to his rights. It may be necessary in cases such as *Wade v. United States*, 388 U.S. 218 (1967)

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attorney might well have preferred to go to trial with Dr. Bindelglas' testimony than risk the result of a properly protected psychiatric examination.

Nor can it be assumed from the earlier refusal of petitioner's counsel to agree to an examination that he would not have advised a contrary course in the changed circumstances resulting from his presence at the confrontation.

[8]We do not reach the question whether an accused has the right to have counsel present at a pretrial mental examination. *Compare* United States *ex rel. Wax v. Pate*, 409 F.2d 498, 499 (7th Cir. 1969), *with* Thornton v. Corcoran, 407 F.2d 695, 698-702 (D.C. Cir. 1969). *See also* United States v. Albright, 388 F.2d 719, 726 (4th Cir. 1968).

[9]*See also* Clifton v. United States, 341 F.2d 649, 651-53 (5th Cir. 1965); Lee v. United States, 322 F.2d 770, 778 (5th Cir. 1963). *See also* Beatty v. United States, 377 F.2d 181, 190 (5th Cir. 1967) (dictum). The ruling of this court in Coughlan v. United States, 391 F.2d 371 (9th Cir. 1968), is not to the contrary, for there "a clear and knowing waiver was shown." *Id.* at 372.

(and perhaps *Massiah v. United States*, 377 U.S. 201 (1964)), where some role for the attorney other than his traditional one of legal adviser is found to exist. Such is not the case here, where the need for legal counsel was obvious.

Under Arizona law Schantz had a right to refuse to submit to examination. Whether or not he should have waived this state right was a decision he should not be expected to have made without the advice of his attorney. That decision could have had important results on trial. It was a lawyer's decision. Defendant was, then, clearly entitled to advice of counsel in making the decision and to the presence of counsel at the time he was asked to make it.

Whatever the motive for defendant's refusal of examination then, unless his right under the Sixth Amendment was waived (which obviously it was not), the refusal of examination was protected by that Amendment. Following *Massiah*, it can be said that the basic protection of the Sixth Amendment would be denied by permitting trial testimony as to what occurred in absence of counsel to be used against the defendant. *Id.* at 206.

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AFFIDAVIT

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

CARL WAAG, being first duly sworn, upon oath deposes and says:

That he is an Assistant Attorney General of the State of Arizona; that as such he served the attorney for respondent in the foregoing case by forwarding two (2) exact copies of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in a sealed envelope, first-class postage prepaid, and deposited same in the United States mail addressed to:

John J. Flynn
Lewis Roca Beauchamp & Linton
114 West Adams Street
Phoenix, Arizona 85003

this ____ day of January, 1970.

_____

Subscribed and sworn to before me this ____ day of January, 1970.

_____
Notary Public

My Commission Expires Oct. 13, 1973

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

This is an opposition to a petition for certiorari. The written opinion of the District Court, of which petitioner is apparently unaware, appears as App. B. to this response. The opinion of the Court of Appeals (App.A of Petitioner)

is reported at 418 F.2d 11.

JURISDICTION

The petitioner's motion for rehearing was denied on December 8, 1969 and the petition here was filed on February 16, 1970. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

If a state appointed psychiatrist calls without notice on a criminal defendant at his home after his indictment and demands to administer a psychiatric examination, may defendant, who is given no opportunity to consult counsel, refuse the examination without his refusal being placed in evidence before the jury and becoming the subject of closing argument?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and Sixth Amendments to the United States

Constitution made applicable to the States by the Fourteenth Amendment. The relevant text of these amendments is set forth in App. A.

STATEMENT OF THE CASE

Respondent was charged with the murder of his wife. He pleaded not guilty and served notice of his intent to rely upon the defense of insanity. After a hearing in the district court, that court accepted as accurate the following uncontested factual allegations:

> "Before trial, the County Attorney of Maricopa County had made a motion in Maricopa County Superior Court seeking an order allowing two State's psychiatrists to examine the petitioner. On the day set for hearing this motion the County Attorney withdrew it. The same day the County Attorney sent Dr. Paul Bindelglas, a psychiatrist, to the petitioner's home, unannounced, and without notice to either the petitioner or his counsel.
>
> At trial Dr. Maier Tuchler, a psychiatrist, was called by the petitioner. He testified that he had examined the petitioner on numerous occasions following the offense, and

and gave as his opinion that the petitioner, at the time of the offense, did not know the nature and significance of his acts and did not know right from wrong . . .

In rebuttal of this expert testimony elicited by the petitioner, the State offered no testimony concerning insanity or mental condition. Instead, the County Attorney called Dr. Bindelglas to the stand, qualified him as an expert in psychiatry, and had him testify, over the strenuous objection of the petitioner as follows:

Q. By [Prosecuting Attorney]: You went for the purpose of performing a psychiatric examination?

A. Yes.

Q. Did you ask him to take a psychiatric examination?

A. Yes.

Q. And did you tell him you were from the County Attorney's office?

A. Yes, I did.

Q. And did he agree to a pschiatric examination?

A. He did not. (See 98 Ariz. at 213)

There was no question that Dr. Bindelglas was a total stranger to the petitioner, and that no notice whatsoever of his proposed examination was

given to either petitioner or his counsel.

"In summation, the County Attorney argued:

> Now, ladies and gentlemen, there is a saying that a person who seeks justice in a court of law, should come in with clean hands, and I submit to you, ladies and gentlemen, that if this was a bona fide, good faith defense of insanity, why didn't he permit our psychiatrist to examine him?
>
> He said he was from the County Attorney's office. He said he was a psychiatrist. He asked to examine him.
>
> If this is a good faith defense, and this man has nothing to hide, why didn't he let our psychiatrist examine him?
>
> His refusal to let our man examine him shows bad faith. We would have liked to have him examined . . . .
>
> Ladies and gentlemen, I submit to you that this is not a good faith defense to insanity."

(Petitioner's Memorandum in Support of Petition for Writ of Habeas Corpus, pp.2-3).

On appeal to the Supreme Court of Arizona, Dr. Bindelglas' testimony was held to have been properly admitted. State v. Schantz, 98 Ariz. 200, 403 P.2d 521 (1965), cert. den'd 382 U.S. 1015 (1966).

The District Court granted respondent's petition for habeas corpus for two separate reasons. First, it held that the admission of Dr. Bindelglas' testimony and the subsequent comments on it by the County Attorney operated to penalize petitioner for exercising his privilege against self-incrimination and was therefore unconstitutional. Secondly, it held that the post-indictment questionnng of petitioner by a state psychiatrist at the County Attorney's behest without notice and in the absence of counsel, violated petitioner's right to counsel.

The Ninth Circuit Court of Appeals affirmed, basing its decision primarily on the right of counsel. It held that under United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), a request to undergo state

psychiatric examination required the assistance of counsel at a post-indictment pretrial confrontation. The Court noted that:

> "Had counsel been present he could have negated the strategy by immediately informing Dr. Bindelglas that the County Attorney's attempt, through the agency of Dr. Bindelglas, to communicate directly with the petitioner rather than with the petitioner's counsel, was a gross violation of professional ethics . . . .
>
> Moreover counsel could have told petitioner that his refusal might be admitted in evidence against him, and could have advised him whether, in the light of this fact, it would have been better to agree to an examination . . . . [C]ounsel might have afforded petitioner further protection by insisting that the examination be conducted under appropriate safeguards, such as use of neutral experts, the presence of a defense representative, and the preparation of a tape or stenographic record of the examination." 418 F.2d at 14.

The Court specifically noted in a footnote:

> "We do not reach the question whether an accused has the right to have counsel present at a pretrial mental examination." 418 F.2d at 15, n.9.

REASONS FOR DENYING THE WRIT.

I. There is No Conflict of Decision.

The State argues that the opinion of the court below "flies in the face of opinions expressed in other United States Circuit Court of Appeals" (Pet. at 17), but cites only United States ex rel. Wax v. Pate, 409 F.2d 498 (7th Cir. 1969) as being in conflict with the decision below. That case involved the question of whether an attorney had the right to be present during the actual psychiatric examination of his client. The case at bar raises an entirely different question; that is, whether a defendant has the right to counsel when he is asked to undergo such an examination. The Ninth Circuit recognized this, specifically limited its opinion and expressly, naming the Wax case, declined to consider the issue it raised.

"We do not reach the question whether an accused has the right to have counsel present at a pre-trial mental examination." citing United States ex rel. Wax v. Pate, supra; Thornton v. Corcoran, 407 F.2d 695 (D.C. Cir. 1969); and United States v. Albright, 388 F.2d 719 (4th Cir. 1969). 418 F.2d at 15, n. 8.

The Court below noted and followed the only decision raising the precise question before this Court. 418 F.2d at 14, n.7. United States v. Driscoll, 399 F.2d 135 (2d Cir. 1968) holds that it is unfair to permit a psychiatrist who was allowed to examine the defendant to determine whether he was competent to stand trial to also testify as to the defendant's sanity at the time of the commission of the crime. The Second Circuit said that the defendant must be told of the dual purpose of the examination so that his lawyers can ask for and obtain the procedural safeguards to which the defendant is entitled.

II. The Decision was Correct.

As this Court's decision in United States v. Wade, supra, states:

> ". . . [I]n addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." 388 U.S. at 226.

The test as it has evolved from United States v. Wade, supra; Massiah v. United States, 333 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 268 (1964); and Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964) is that the presence of defendant's counsel is required if it is necessary in order adequately to prepare for the trial, meaningfully to cross-examine the witnesses against the defendant, or to preserve the defendant's right to a

fair trial by advising him of his rights. The opinion of the court below has adequately stated the complexities which suddenly faced the defendant when he was confronted with a state psychiatrist who asked to examine him. We merely note that Mr. Schantz was asked to make a decision with complicated legal consequences on a moment's notice and without the necessary knowledge or advice. Further, he was placed in a position of being alone while the State sought evidence to be used against him. The admission into evidence of his refusal to undergo the examination under circumstances when the advice of counsel not only would have better prepared him to make such a decision, but would have been of immense help in preparing for trial, violated the defendant's constitutional right to the assistance of counsel under the Sixth Amendment to the Constitution

of the United States. Apart from technical considerations, this was unforgiveably shabby business. The making of the motion, its withdrawal, and the visit to the house on the same day was trickery not to be encouraged.

III. This Case Will Never Arise Again.

When Schantz was pending trial, Arizona had no statutory authority for court-ordered mental examinations and the courts had no inherent power to order it. Steward v. Superior Court, 94 Ariz. 279, 383 P.2d 191 (1963).

A 1968, post-Schantz statute, A.R.S. § 13-621, et seq. provides for bifocated trials and further provides:

> "In any case involving the defense of not guilty by reason of insanity, both the defendant and the State shall have the right to have the defendant examined by qualified psychiatrists appointed by the Court for the purpose of presenting testimony." A.R.S. § 13-621-1(J)

Thus Arizona has now joined the majority of States which have similar legislation. See Compulsory Mental Examination and the Privilege Against Self-Incrimination, Wis. L. Rev. 671 (1964) and the collection of similar statutes appearing in Model Penal Code § 4.05, Comment (Tent. Draft No. 4, 1955). State psychiatrists no longer need bang on defendants' doors and ask them if they will submit to an examination. The request for examination and the appointment of examining doctors are now made in open court. As a result, counsel are always present when the arrangements for the examination are made. This case will not reoccur.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

LEWIS ROCA BEAUCHAMP & LINTON

By John P. Frank
Michael J. LaVelle

Attorneys for Respondent.

March, 1970.

Constitution of the United States

Amendment V:

"No person shall . . . be compelled in any criminal case to be a witness against himself . . ."

Constitution of the United States

Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

Constitution of the United States

Amendment XIV:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

APPENDIX "A"

OPINION AND ORDER OF DISTRICT COURT

Petitioner filed herein on November 7, 1967, a petition for writ of habeas corpus wherein he alleges he is being unlawfully imprisoned in the Arizona State Prison, Florence, Arizona. Pursuant to an order of this Court, respondent herein filed a response to said petition, and this cause came on for hearing before this Court on December 18, 1967.

Respondent has not seen fit to file herein a reporter's transcript of proceedings of petitioner's state court trial, nor has he denied petitioner's factual allegations; therefore this Court accepts them as true and finds them sufficient upon which to proceed without an evidentiary hearing. The facts pertinent to the issues herein are as follows:

Petitioner is presently imprisoned pursuant to a judgment of the Superior Court of Arizona, Maricopa County, entered on January 28, 1963, in cause number 40470, wherein he was adjudged guilty of murder in the second degree, and sentenced to not less than 15 nor more than 16 years in the state prison. Prior to petitioner's trial, but subsequent to his arraignment, the County Attorney made a motion in Maricopa County Superior Court seeking an order to allow two state psychiatrists to examine petitioner. On the date set for this hearing, the motion was withdrawn by the County Attorney (apparently due to a lack of authority for such an examination. See State v. Schantz, 98 Ariz. 200, 403 P.2d 521, 530). The same day Dr. Paul Bindelglas, a psychiatrist, was sent by the County Attorney to the petitioner's home, unannounced, and without notice to either the petitioner or his

counsel. Dr. Bindelglas introduced himself to petitioner, explained that he was from the County Attorney's office, and requested that petitioner submit to a psychiatric examination. Petitioner refused to do so, and Dr. Bindelglas left. Thereafter, at petitioner's trial, he raised the defense of insanity calling a qualified psychiatrist to testify on his behalf. The state offered no expert evidence in rebuttal. Instead it called Dr. Bindelglas to the stand and, over the objection of petitioner's counsel, elicited from him the results of his confrontation with petitioner. These facts were later argued by the County Attorney, in his summation to the jury, as evidence that petitioner's defense of insanity was made in bad faith.

Although petitioner alleges that he has exhausted his state court remedies in accordance with 28 U.S.C. Section 2254,

and respondent does not contest that issue, it is incumbent on this Court to determine that issue before proceeding further. Petitioner appealed his conviction to the Arizona Supreme Court and it was affirmed by them on June 23, 1965. State v. Schantz, supra. Certiorari was denied by the United States Supreme Court on January 24, 1966. Schantz v. Arizona, 382 U.S. 1015, 86 S.Ct. 628. While the operative facts upon which petitioner now bases his claim were before the Arizona Supreme Court (State v. Schantz, supra), he did not litigate there the precise issues he is now raising in this Court. He is thus confronted with the rule that state remedies are not exhausted with respect to a question not presented for adjudication in an available state court proceeding. United States v. Ragen, 222 F.2d 654 (7th Cir. 1955). However, in the case of Daugharty v. Gladden, 257 F.2d 750 (1958), the Ninth Circuit Court of

Appeals, in dealing with an issue similar to the one presented here, stated at page 758:

> ". . . the state court having been presented with all the operative facts giving rise to the asserted constitutional principle, exhaustion of state remedies is not to be denied because the Fourteenth Amendment was not specifically mentioned." [emphasis added]

The court in Daugharty distinguished its holding from that in Ragen by pointing out that in the latter the facts upon which the federal question was predicated in the federal habeas corpus proceeding had never been submitted to the state court, while such was not the case in Daugharty. Even if one might determine that the facts in petitioner's case are not governed by the rule in Daugharty, which this Court does not, it is still necessary to decide if there remains an effective state forum in which petitioner might obtain relief. Although the remedy of habeas corpus is

available in the State of Arizona (A.R.S. Section 13-2001), it is limited in scope. State v. Court of Appeals, Division Two, 416 P.2d 599 (1966). Considering the facts presented here, in light of the above-cited case, it is not unreasonable to assume that petitioner could obtain no relief via a state habeas corpus petition. In view of the above, it is the opinion of this Court that petitioner has exhausted his state remedies within the meaning of 28 U.S.C. Section 2254.

Petitioner's first contention, that the introduction and receiving into evidence of testimony of his refusal to submit to a psychiatric examination, and the prosecutor's comments thereon, was a violation of his rights under the Fifth Amendment to the Constitution of the United States, is well founded. Respondent's reply to this contention is that the evidence in question

was relevant to the issues before the court, and therefore its admission in evidence and the subsequent comment upon it, was not erroneous. It is sufficient to dispose of this argument by pointing out that numerous items of evidence, including confessions obtained by coercion, may be relevant, but are, nevertheless, inadmissible as evidence if they do not otherwise conform to the rules pertaining to their admissibility. This Court, conceding the relevancy of the questioned evidence, must thus determine if it otherwise qualifies as admissible evidence. That the constitutional protection of the Fifth Amendment is applicable to state court proceedings through the due process clause of the Fourteenth Amendment is made clear by the decisions of the Supreme Court in Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489 (1964), and Griffin v. California, 380 U.S. 609,

85 S.Ct. 1229 (1965). Although neither Malloy nor Griffin had been decided at the time of petitioner's trial, both had been determined prior to the date of the decision in petitioner's case on direct appeal. State v. Schantz, supra. The Supreme Court, in discussing the retroactivity of its decision in Griffin, stated in the case of Tehan v. United States, 382 U.S. 406, 86 S.Ct. 459 (1966), at page 461, footnote 3:

> "Nor is there any question of the applicability of the Griffin rule to cases still pending on direct review at the time it was announced."

The court's reasoning in Tehan leaves little doubt that a similar application of limited retroactivity would apply to its decision in Malloy v. Hogan, supra. This Court, then, considers itself governed by the decisions obtained in Griffin and Malloy in deciding the issues before it.

The decisions in Malloy and Griffin make it abundantly clear that the privilege against self incrimination includes not only the right to remain silent, but also the right to suffer no penalty for that silence. Other decisions condemning the use of evidence that an accused elected to rely on his Fifth Amendment right and remain silent are: Grunewald v. United States, 353 U.S. 391, 77 S.Ct. 963 (1957); Fagundes v. United States, 340 F.2d 673 (1st Cir. 1965).

The facts of this case, however, are unlike those in Malloy and Griffin, for here petitioner was not undergoing a police interrogation, nor was there a comment on his refusal to testify at trial; he was, rather, being asked to submit to a psychiatric examination at the hands of a state-selected psychiatrist. Respondent does not contend that the county prosecutor was acting under statutory or judicial authority in requesting

petitioner to submit to the psychiatric examination, nor does it appear that such would have been possible. Steward v. Superior Court of Maricopa County, 383 P.2d 191 (1963). Although the decision in Steward was not handed down until after the petitioner's trial, it was decided prior to the decision in petitioner's case on appeal, and was in fact referred to by the court in State v. Schantz, supra, at page 530, footnote 9. The Arizona Supreme Court's decision in Steward makes it clear that the state presently has no statutory or inherent authority to force an accused to submit to a psychiatric examination against his will, pointing out that to do so would violate his rights against self incrimination. In accord is a recent decision of the Minnesota Supreme Court. State v. Olson, 143 N.W.2d 69 (1966). There is no question but what petitioner,

under the facts herein, was entitled to remain silent, and refuse to submit to a psychiatric examination if he so chose, such right being fundamental under the Fifth Amendment to the Constitution of the United States. Thus determining that petitioner was exercising his constitutional right to remain silent, when he refused to submit to the psychiatric examination, the introduction of such evidence in his state court trial and comment thereon by the prosecutor falls squarely within the prohibition of the Supreme Court in Malloy v. Hogan, supra, and Griffin v. California, supra. To provide that an accused may lawfully refuse to submit to a psychiatric examination, and when he does so, use his refusal as evidence against him at his trial, bespeaks of fundamental unfairness and renders his rights void and empty meanialities.

Petitioner also contends that the conduct of the County Attorney in sending Dr. Bindelglas to see him, without notice to his counsel, violated his right to effective assistance of counsel under the Sixth Amendment to the Constitution of the United States. There is no question that formal charges were pending against petitioner at the time he was approached by Dr. Bindelglas, and that petitioner was represented by counsel known to the County Attorney at the time. It is, furthermore, clear that Dr. Bindelglas was acting as a representative of the county attorney's office when he contacted petitioner. The United States Supreme Court has for some time recognized that from the time of arraignment until the beginning of the trial is a critical period of the proceedings, wherein an accused is entitled to the assistance of

counsel. Powell v. State of Alabama, 287 U.S. 45, 53 S.Ct. 55 (1932); Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199 (1964). The Supreme Court of Arizona in the case of State v. Gallagher, 396 P.2d 241 (1964), decided subsequent to petitioner's trial but prior to the determination of his appeal, referred to the Supreme Court's decisions in Powell and Massiah in declaring that admissions obtained from an accused after an information had been filed and without permission of his counsel, were inadmissible as a matter of law.

The primary distinction between the facts in petitioner's case and the cases cited above is that the petitioner chose to remain silent during the unlawful confrontation, whereas the other accused made incriminating statements. If petitioner had submitted to the examination and made incriminating statements to Dr.

Bindelglas, there could be no question but what the statements would be inadmissible under the Supreme Court's ruling in Massiah v. United States, supra. Should the law be otherwise then, when petitioner elects to exercise his constitutional right to remain silent? This Court thinks not. The importance of an attorney's advice and assistance during a confrontation such as here with Dr. Bindelglas, can be more graphically illustrated if one assumes for the purposes of this example, that the evidence of petitioner's refusal to submit to an examination would be properly admissible against him. Then, more than ever, would petitioner require the advice and assistance of legal counsel to explain the various consequences of his ultimate election. This Court is not unmindful of the fact that an unlawful confrontation, in and of itself, may be harmless to an

accused and that he must also show that the unlawful act operated to his substantial prejudice. Such prejudice is obvious under the facts presented herein. The sole evidence offered by the state in petitioner's trial to rebut the testimony of his psychiatrist, was the fact that petitioner refused to submit to an examination by Dr. Bindelglas. The prosecutor's comments thereon only emphasized the importance that the state placed thereon.

In view of the findings reached herein, it is the opinion of this Court that petitioner is entitled to a new trial on the merits. Accordingly,

IT IS ORDERED that the judgment of conviction in Superior Court, Maricopa County, criminal cause number 40470, State of Arizona v. Joseph A. Schantz, dated January 28, 1963, is hereby vacated

and set aside, and petitioner is remanded to the custody of the authorities of the State of Arizona for appropriate proceedings not inconsistent with the views expressed herein;

IT IS FURTHER ORDERED that unless the State of Arizona affords the petitioner a new trial within 90 days from this date, a writ of habeas corpus shall issue for the release of petitioner from the custody of respondent.

DATED this 25th day of January, 1968.

WM. P. COPPLE
United States District Judge